Headquarters U.S. Air Force

Integrity - Service - Excellence

Military Justice 101

It ain't quite like the TV shows
or the movies
or the news….

Jim Russell

Air Force Legal Operations Agency

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TOM CRUISE
JACK NICHOLSON
DEMI
NCIS
CLOSE, but . . .
JAG

Block Overview

- The Players
- The Modern U.S. Military Justice System
- Jurisdiction
- Disciplinary Process
  - Article 15
  - Court-Martial
- Victim Witness Assistance Program (VWAP)

Who are the players?

- Military Criminal Investigative Organizations (MCIOs) investigate serious offenses
  - Independent fact finders
  - Do not work for local commander
  - Decision to initiate an investigation rests solely with MCIO
  - Do not form opinions or judgments
- Commanders decide
  - Immediate unit commander
  - Court-martial convening authority
  - Commanders must administer military justice fairly and impartially, while maintaining good order and discipline
- Staff judge advocates advise and execute decisions
- Individual judge advocates perform unique roles

Commander

- A person who lawfully exercises authority over subordinates by virtue of rank or assignment
- Command is a specific and legal position unique to the military
- Commanders accountable for accomplishing the mission, keeping the institution sound, and caring for their people

Commander

- **The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority**
  - **Nowhere else does a boss have to answer for how subordinates live and what they do after work**
  - **On the one hand, the nation grants commanders special authority to be good stewards of its most precious resources: freedom and people**
  - **On the other hand, those citizens serving in the military also trust their commanders to lead them well**
  - **Commanders have the authority to set policy and punish misconduct**

Convening Authority

- Commander (Usually Wing Commander or higher)
- Responsibilities
  - Refers charges to trial
  - Selects members
  - Reviews the results and approves or disapproves findings and sentence
  - Considers whether clemency appropriate

Commander

It is sometimes frustrating to try and explain to someone— military or civilian—what this "being a commander" thing is all about simply because they cannot possibly understand the depth, complexity, and hours involved. Nor could you. I am a teacher, counselor, rescuer, parent, mentor, confessor, judge and jury, executioner, cheerleader, coach, nudger, butt-kicker, hugger, social worker, lawyer, shrink, doctor, analyst, budgeteer, allowance giver, career planner, assignment getter, inspector, critiquer, scheduler, planner, shopper, social eventer, party thrower, and absolutely as often as possible — sacrificial lamb. I am my squadron's commander, and will only do this job one way while I'm in it . . . whatever it takes to serve them.

Lt Col Eileen Isola
Commander, 463d Operations Support Squadron

Command Influence

- Commanders responsible for administration of military justice and maintenance of discipline
  - Requires positive involvement
  - Must ensure that process is open and fair
- Law requires commanders to avoid certain types of activity

Unlawful Command Influence

- **Commanders may not:**
  - **Attempt to control court-martial proceedings**
  - **Attempt to sway testimony of witnesses**
  - **Develop a closed or inflexible mind as to the proper disposition of any class of offenses**
  - **Consider a court member's actions in preparing a performance report**
  - **Censure a judge or court member with respect to any court function**
  - **Interfere with rulings of the military judge**

Judge Advocates

- The Judge Advocate General's Corps
  - Provides essential legal support for military operations
  - Advocates and litigates to preserve command prerogatives
  - Administers civil and criminal law programs
  - Educates and counsels leaders and personnel in the law
- SJA is the commander's legal advisor

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American Military Justice System

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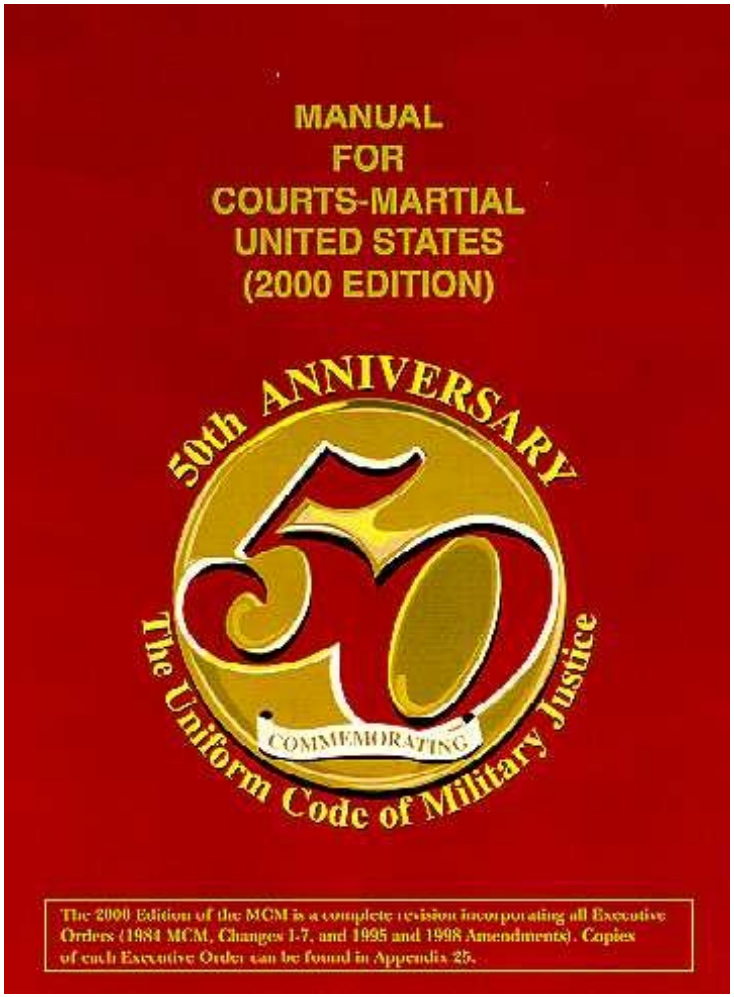
Modern Military Justice System

- US Constitution
  - Congress has power to make rules for government and regulation of land and naval forces
  - President is Commander in Chief
- The Uniform Code of Military Justice (UCMJ)
  - Federal statute passed in 1951
  - 1950 statute still the basic structure
  - 1969: Enhanced role of judges, defense counsel
  - 1984: Many rule changes
- Manual for Courts-Martial (MCM)

Manual for Courts-Martial


MANUAL
FOR
COURTS-MARTIAL
UNITED STATES
(2000 EDITION)
50th ANNIVERSARY
50
COMMEMORATING
The Uniform Code of Military Justice
The 2000 Edition of the MCM is a complete revision incorporating all Executive Orders (1984 MCM, Changes 1-7, and 1995 and 1998 Amendments). Copies of each Executive Order can be found in Appendix 25.

- First MCM published in 1951
- Executive Order issued by the President
- Reviewed annually by Joint Service Committee on Military Justice

Why a Separate Military Justice System?

- World-wide mission
- Unique military offenses
- Disciplinary requirements

1998 court-martial at Prince Sultan AB Saudi Arabia

Jurisdiction

- Capacity to take valid legal action
- Must have jurisdiction over
  - Person
  - Place
  - Crime

UCMJ Jurisdiction: Person

- Article 2, UCMJ
  - Active duty military members
    - 24/7
  - Reserve Component
    - Reserve
      - Active Duty (AD) Tours
      - Inactive Duty For Training (IDT)
    - National Guard (NG)
      - Only in Federal status
      - State Status: belong to Governor of their state

UCMJ Jurisdiction: Place

- World-wide

TIME
HADITHA
SPECIAL REPORT
Inside the investigation of whether the death of a U.S. Marine triggered the killing of 24 Iraqis—and a military cover-up

UCMJ Jurisdiction: Crime

- **Enumerated Offenses (Articles 81-132)**
  - **Common law criminal offenses**
  - **Unique military offenses**
- **General Articles (Articles 133-134)**
  - **Conduct unbecoming an officer and gentleman**
  - **Disorders and neglects to the prejudice of good order and discipline in the armed forces**
  - **Conduct of a nature to bring discredit upon the armed forces**
  - **Noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act**

Jurisdiction

- Concurrent jurisdiction may still exist
  - Jurisdiction may be shared with State, Federal, or Foreign government
  - Typical considerations
    - Location of crime
    - Duty status of accused
    - Victim's status
    - Type of offense - military specific
  - Status of Forces Agreements (SOFAs)

Military Justice System

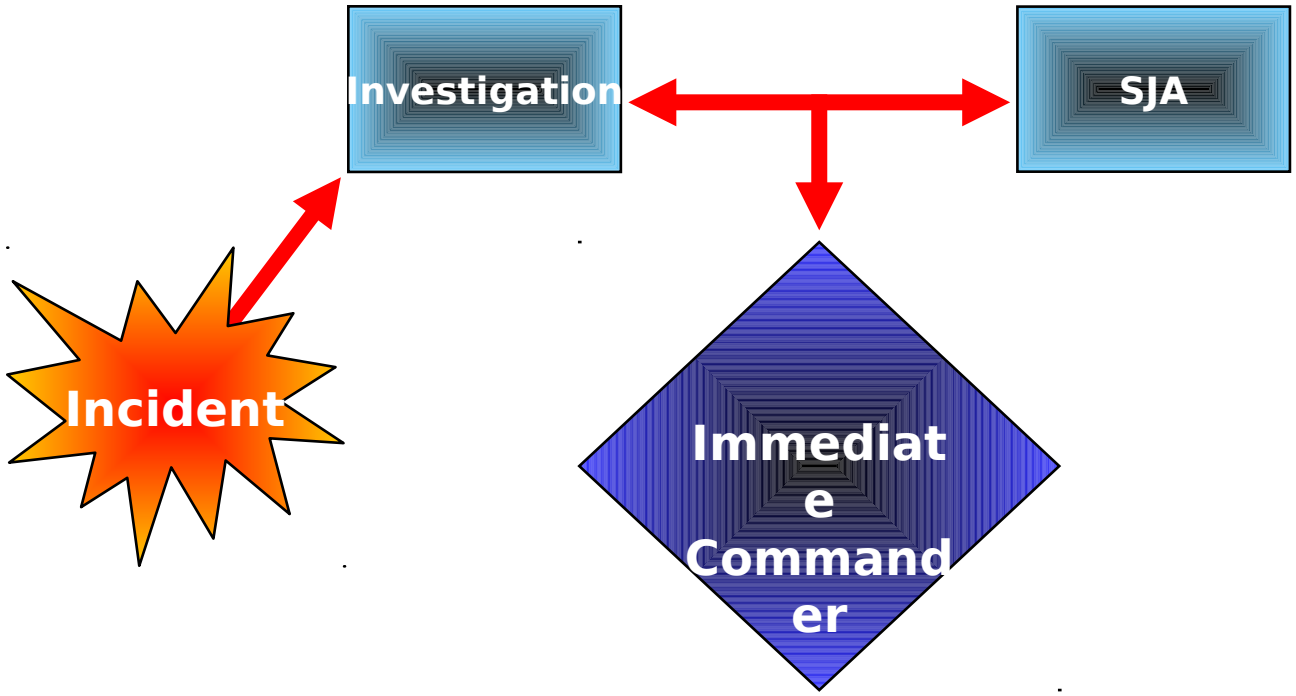
- Commander-driven system
  - Immediate unit commander
  - Court-martial convening authority
  - Commanders must administer military justice fairly and impartially, while maintaining good order and discipline
    - Requires positive involvement
    - Must ensure fair and open process
    - Must be even-handed
- Staff judge advocate advises and executes decisions
- Individual judge advocates perform unique roles

Constitutional Protections

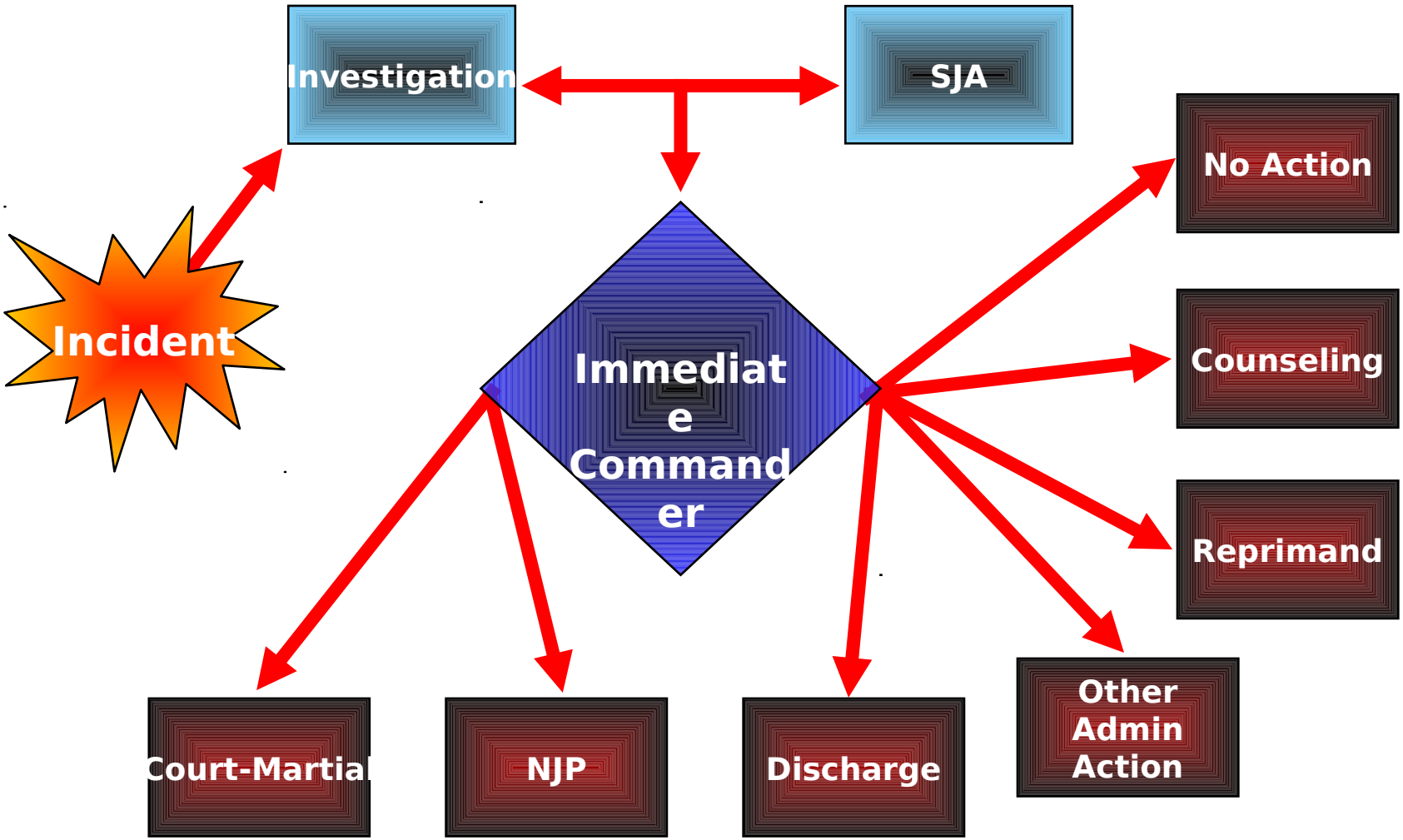
- **Military as citizens:**
  - **Constitutional protections apply to military members**
  - **May be overridden by the demands of "discipline and duty"**

- **Examples**
  - **No "indictment" by a grand jury**
  - **Different privacy, property, and free speech rights**
  - **However protections against self-incrimination are stronger**

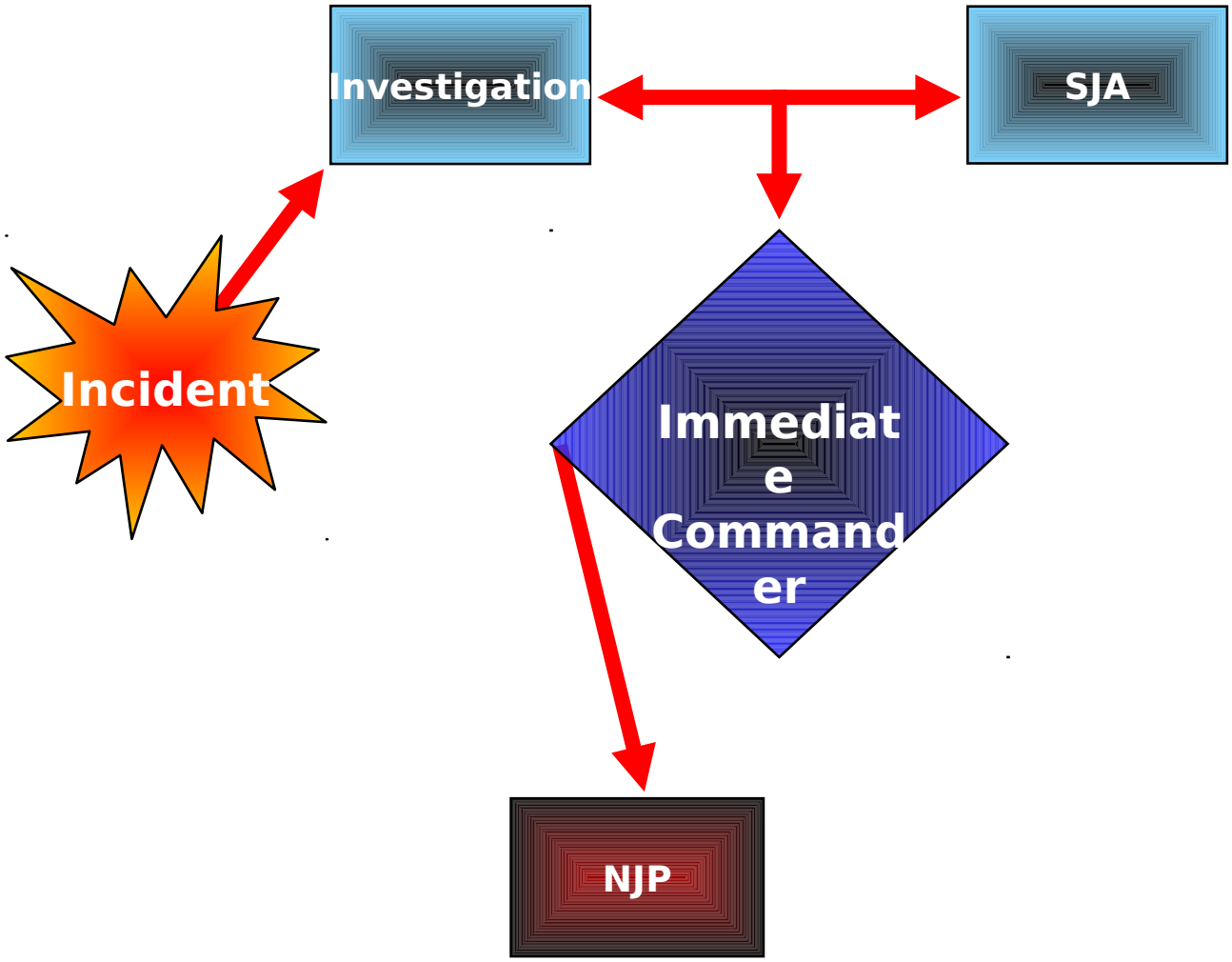
Disciplinary Process



Disciplinary Process



Disciplinary Process



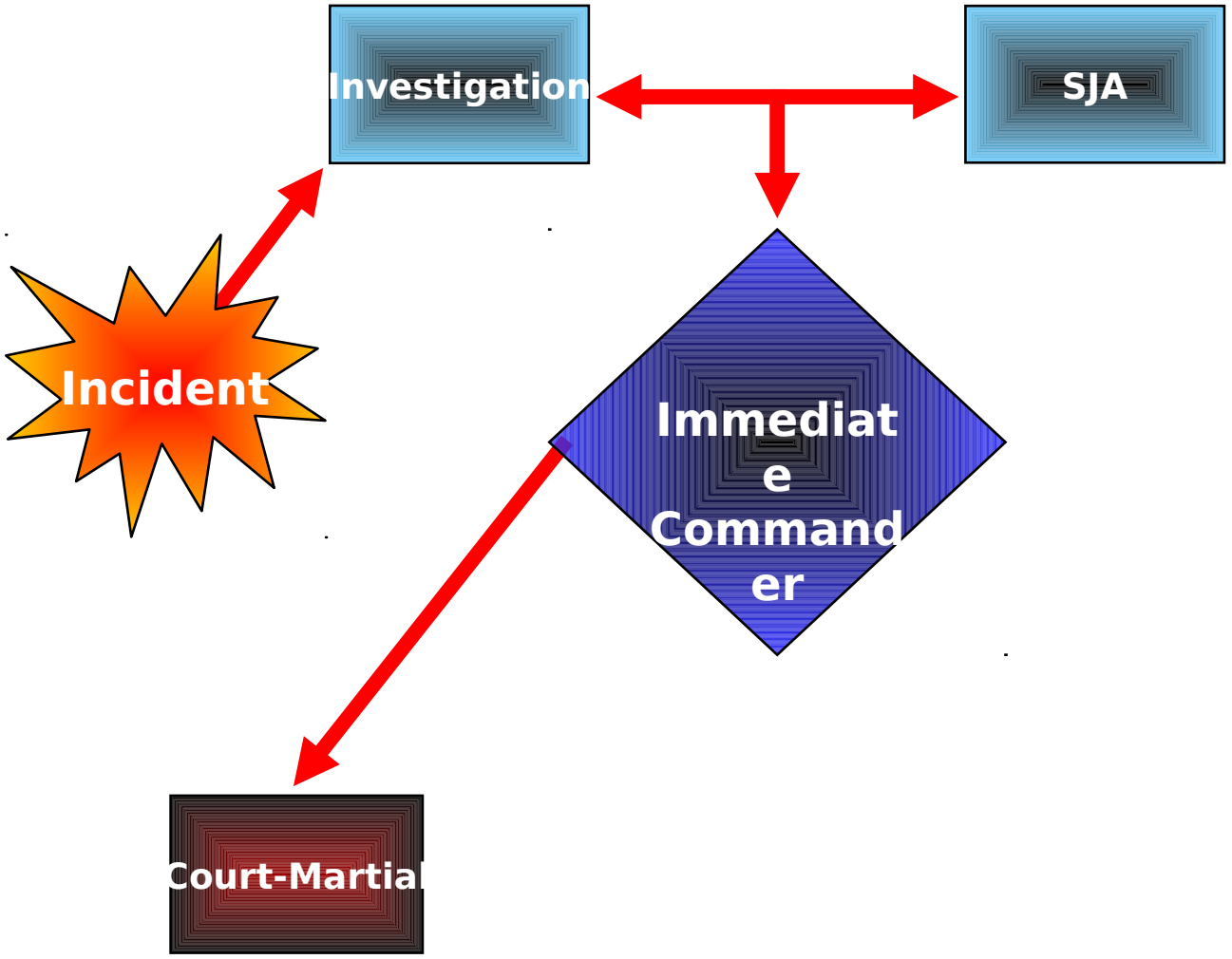
Nonjudicial Punishment Article 15, UCMJ

- For minor offenses
  - Shorter statute of limitations (2 years)
- Not a criminal conviction
- Access to counsel…
- Burden of proof
  - Army: Beyond a reasonable doubt
  - AF: None except that member generally may turn down the Article 15 and demand trial by court-martial
    - Unless attached to or embarked in a vessel
- Member can present evidence / witnesses

Nonjudicial Punishment Article 15, UCMJ

- The commander
  - Decides whether member committed offenses alleged
  - Imposes appropriate punishment
- Punishments include reduction and forfeiture of pay
  - Punishments differ based upon the rank of the imposing commander and the rank of the member
  - No confinement
- Offender can appeal to next commander

Disciplinary Process



Types of Courts-Martial

- **Summary Court-Martial**
  - **One officer**
  - **Accused can refuse**
  - **Limited punishment (30 days confinement)**
- **Special Court-Martial**
  - **3 officer (minimum) panel; can request enlisted members**
  - **Military judge presides, can hear without members**
  - **Maximum sentence: bad conduct discharge; confinement for one year; forfeitures of 2/3 pay for one year; reduction to E1**

Types of Courts-Martial

- General Court-Martial
  - 5 officer (minimum) panel; can request enlisted members
    - Minimum 12 members in capital case
  - Military judge presides, members required in capital cases
  - Maximum sentence: punishment authorized for offense, can include death, confinement for life

Military Court Members

- Chosen for their age, experience, judicial temperament by the Convening Authority
- Usually officers
  - Can include enlisted if the accused is enlisted and requests enlisted members
- May ask questions and request witnesses

Military Judges

- Qualifications
- Responsibilities
- Chain of command

Military judge and paralegal court reporter
Court-martial at Prince Sultan AB, Saudi Arabia, 1998

Military Counsel

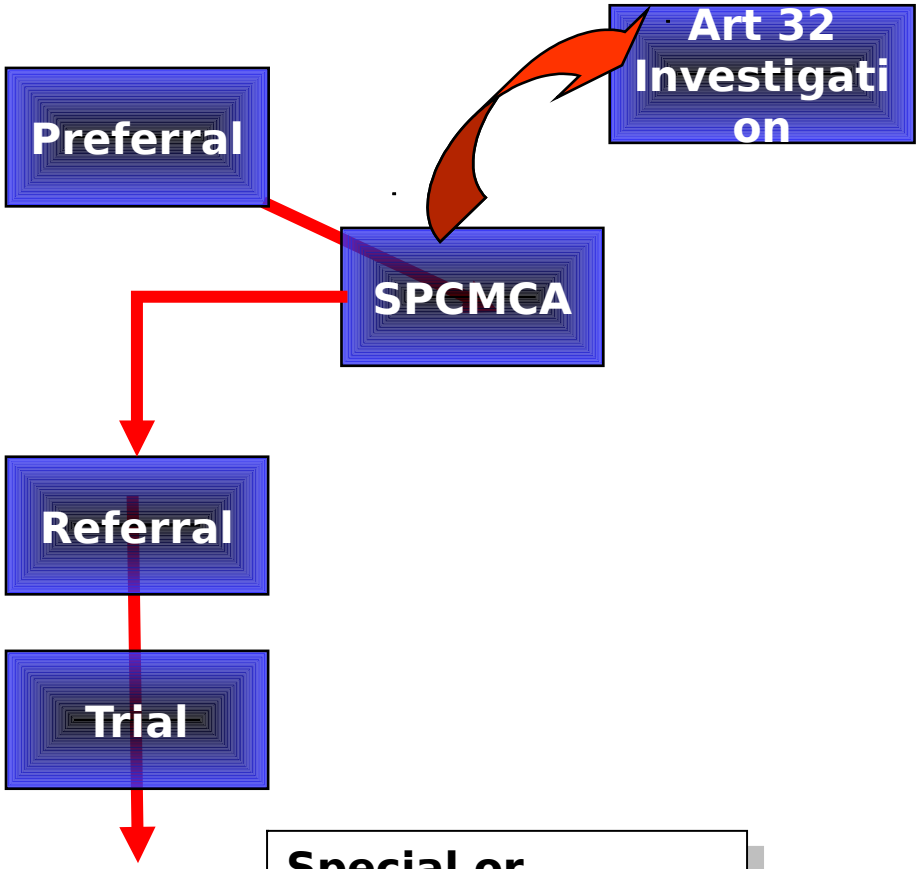
Trial Counsel

- Represents the United States
  - Duty to zealously represent client
- A

Defense Counsel

- Represents the accused
  - Duty to zealously represent client
- Independent chain of command
- Provided at no cost

Court Martial Process

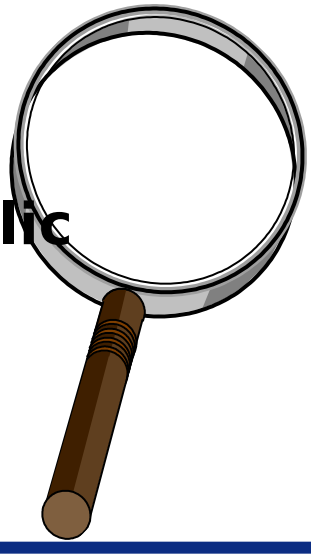


General Court-Martial

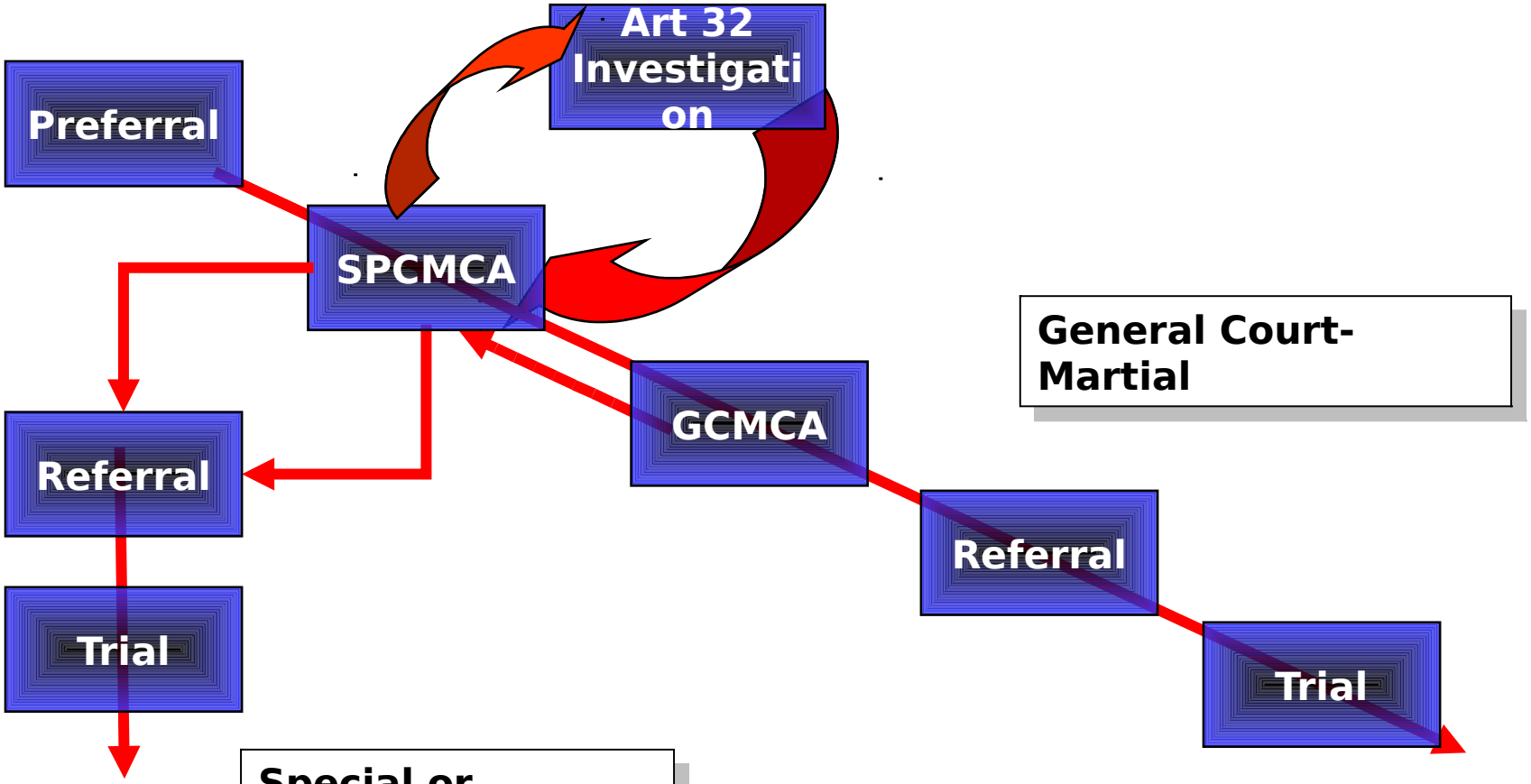
Special or Summary Court-Martial

Article 32 Investigation

- Charges investigated to see if trial warranted, and at what level
- An accused has the right:
  - To be present and to be represented by counsel
  - To provide testimony or offer other evidence
  - To question witnesses
  - To review the evidence
  - To (normally) have an open and public hearing
- Accused may waive Article 32



Court Martial Process



Anatomy of a Trial

- **Bifurcated: guilt or innocence then sentencing if necessary**
- **Article 39a sessions**
- **Arraignment**
  - **Forum Selection (can elect to go military judge sitting alone)**
  - **Motions**
  - **Pleas**
- **If Guilty Plea then *Care* inquiry**
  - **Military Judge (MJ) puts accused under oath and advises the accused of the elements of the offenses**
  - **Accused must satisfy the MJ that accused is guilty by admitting all of the facts necessary to prove the elements**
  - **If accused can't do so, guilty plea is rejected and not guilty plea entered**

Anatomy of a Trial

- Voir Dire
- Challenges to members
  - Preemptory
  - For cause
- Opening statements
- Prosecution case
- Defense case, if any
- Rebuttal / Surrebuttal
- Closing arguments
- MJ instructs members as to law
- Members retire to deliberate
  - Unanimous vote not required

Anatomy of a Trial

- Findings announced
- Sentencing phase if required
  - Max sentence is lesser of punishment authorized for court or offenses convicted
  - If bench trial, MJ imposes sentence
  - If members, same members impose sentence
  - If guilty plea, accused can elect members or MJ
- Prosecution Sentencing Evidence
  - Victim Impact Statements
- Defense Sentencing Evidence
- Rebuttal (Surrebuttal as permitted)
- MJ instructs on law

Anatomy of a Trial

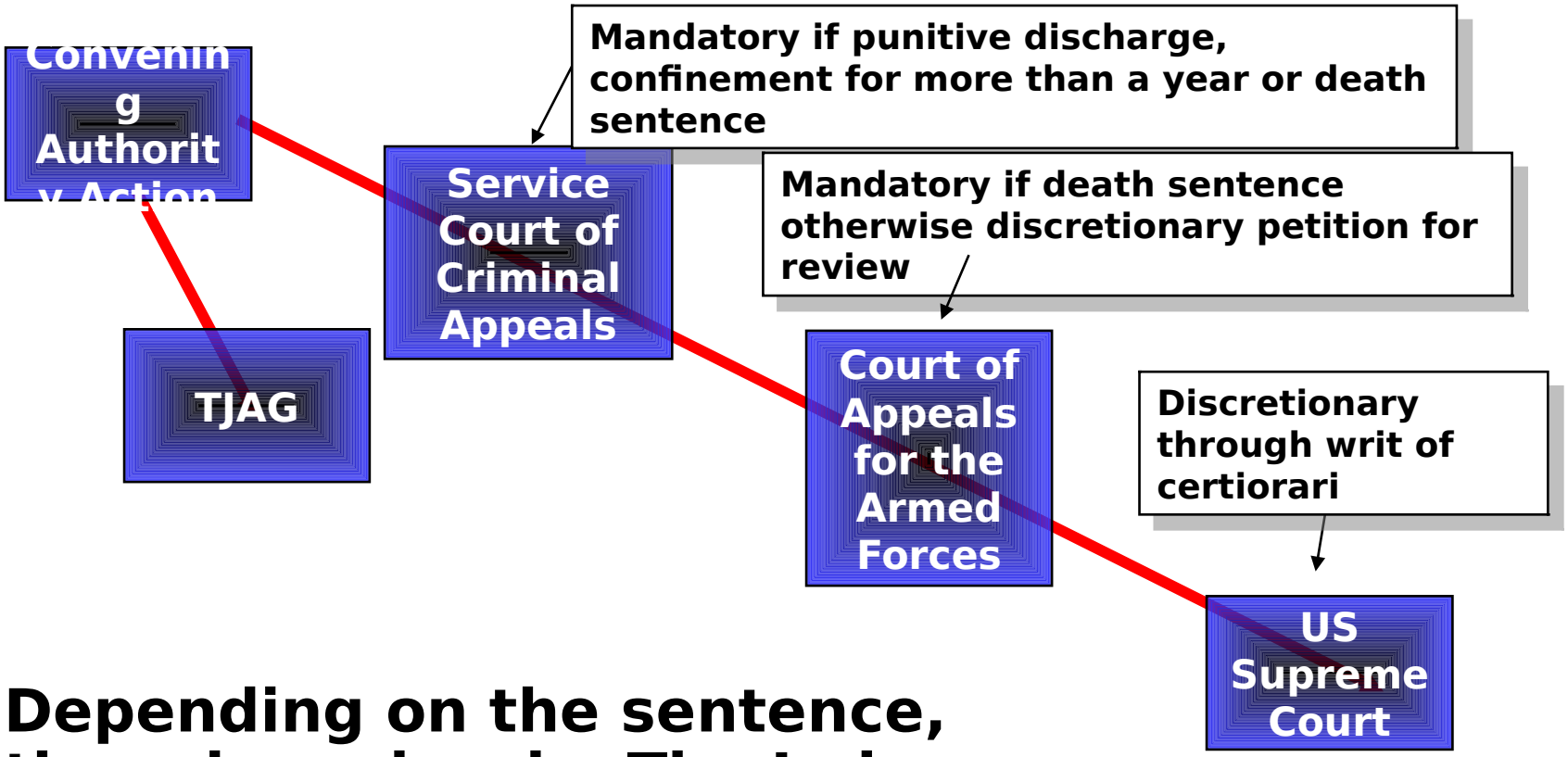
Sentencing

- **Punitive discharge**
  - **Dismissal (officers); Dishonorable; Bad Conduct**
- **Confinement**
  - **Can be local or central confinement facility**
- **Reduction in grade**
  - **Only enlisted**
- **Forfeiture of pay**
  - **Up to total forfeitures depending on type of cour**

Post-Trial Process

- Record of Trial (ROT) transcribed
- ROT authenticated by MJ
- ROT and SJA Recommendation (if required) served on accused
- Accused may submit matters for the convening authority to consider
- Action by convening authority
  - Findings and sentence
- Appellate process

Post Convening Authority Process


Convening Authority Action
Mandatory if punitive discharge, confinement for more than a year or death sentence
Service Court of Criminal Appeals
Mandatory if death sentence otherwise discretionary petition for review
TJAG
Court of Appeals for the Armed Forces
Discretionary through writ of certiorari
US Supreme Court

- **Depending on the sentence, there is review by The Judge Advocate General or judicial review**

Appellate Review

- Counsel provided
- Courts of Criminal Appeals
  - Mandatory if punishment includes a punitive discharge or confinement for one year or greater
  - Fact finding power
- Discretionary review at:
  - US Court of Appeals for the
  - Armed Forces
  - United States Supreme Cou

Key Differences: MJ v Civilian

- No cost for attorneys from pretrial to Supreme Court
  - Specialized appellate counsel
- No bail; strict procedures for pretrial confinement
- Open discovery, worldwide access to witnesses and experts
- Article 32 provides more safeguards than grand jury
- There are no retrials for a “hung jury”
  - The finding is not guilty
- Free transcript of trial

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Ancillary Actions

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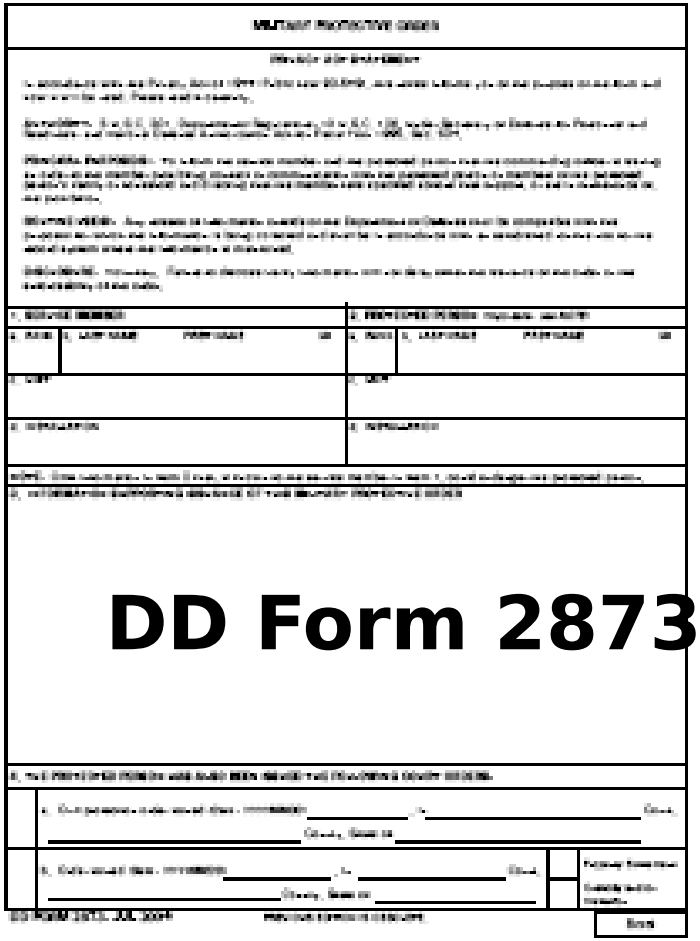
No Contact / Military Protective Orders (MPOs)

- Individuals can be ordered not to have contact with victim
  - Breach is a crime
- MPOs are formal notification to subject and victim that the commander has issued an order prohibiting contact or communication and may include other actions that support the prohibition



DD Form 2873

Pretrial Confinement

- No bail in military
- Requirements
  - An offense triable by court-martial has been committed,
  - The person being confined committed it, and
  - Confinement is required by the circumstances, which requires a finding that either the member is likely flight risk, or poses a serious risk of further misconduct potential, and lesser forms of restraint are inadequate
- Triggers the speedy trial clock (120 days)
- Subject to review
  - 48 hour
  - 7 day
  - Judicial
- Lesser forms can be imposed (restriction etc)

Pretrial Agreements

- Agreement between convening authority and accused
  - Accused offers to plead guilty to some or all offenses
  - CA agrees to limit sentence
    - Frequently cap on confinement; type of punitive discharge authorized; monetary penalties or take other action (refer to lesser court-martial; not pursue administrative discharge; dismiss some charges; etc)
- MJ conducts inquiry as to agreement and accused's understanding of terms
- Members not told about PTA

Discharge in Lieu of Trial

- **Enlisted may submit request for discharge in lieu of court-martial ("Chapter 4")**
  - **Convening authority is approval authority**
  - **If granted, usually under other than honorable conditions**
  - **Court-martial process ceases**
- **Officers may submit resignation in lieu of trial ("RILO")**
  - **SECAF (or designee) is approval authority**
  - **If granted, usually under other than honorable conditions**
  - **Court-martial process ceases**

Advocate's Role in Court-Martial Process

- Safety-Security-Support
- Education about the MPO process
- General education about the criminal justice system
- Support victim and VWAP Liaison interactions
- Encourage, assist and facilitate the victim's use of the multidisciplinary support structure
- Ongoing emotional support of the victim

Typical Victim Participation

- Pretrial
  - Interviews with government and defense counsel
- Article 32 Investigation
- Trial
  - Direct
  - Cross-examination
- Sentencing
  - Victim impact testimony

Typical Victim Issues

- Victim's consent
  - Refuted with physical evidence and/or traumatic responses
  - Privacy issues associated with using trauma evidence
  - Will be an affirmative defense on 1 Oct 07
- Victim's sexual history
  - MRE 412, Rape Shield
  - Exceptions
- Victim's mental health history
- Collateral misconduct

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Victim and Witness Assistance Program (VWAP)

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VWAP Policy

- Service must treat victims and witnesses with fairness and respect
  - Basis for program requirements: Federal statutes, Department of Defense implementing directives, Service regs
  - Applies in all cases in which criminal conduct adversely affects victims or in which witnesses provide information regarding criminal activity
- Victim: A person who suffered direct physical, emotional, or financial harm as the result of an offense
- Service must reasonably protect V/W from accused
- VWAP Liaison appointed

VWAP Rights

- Victims have statutorily designated advisory role in decisions involving prosecutorial discretion (e.g. plea bargains)
  - Victim's views considered but DO NOT supersede AF's decision-making power
- Right to attend public court sessions
  - Unless judge determines testimony would be materially affected if they hear other testimony
- Right to available restitution
- Right to be informed about conviction, sentencing, imprisonment, parole eligibility & release

Military Justice Summary

- Separate system with a unique purpose
- Procedural safeguards and fairness
- System created by Congress, administered by the President as Commander-in-Chief
- Provides a flexible, worldwide basis for maintaining discipline while providing a just result

Thank you for your attention!!!
Your questions, please!